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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

EILEEN LAMOTHE,

Plaintiff and Appellant,

v.

ON THE BEACH SURF SHOP, INC., et al.,

Defendants and Respondents.

H024522
(Monterey County
Super. Ct. No. M47870)

Plaintiff Eileen Lamothe, 46, won a special verdict of $43,970.67 against defendants Kelly Sorensen and On the Beach Surf Shop in her action for personal injuries caused by defendants' negligence in February 1999 in mis-setting her ski bindings. She fell and the bindings did not release causing severe knee injuries. A post-judgment order awarding costs and attorney fees to defendants reduced her judgment by $16,806.33 because she rejected a good faith offer to compromise. (Code Civ. Proc., § 998, hereafter 998 offer.) On appeal she contends the offer was not in good faith.

FACTS

The facts pertinent to this appeal concern the pretrial efforts to settle the dispute. The parties had voluntarily participated in mediation, which took place on June 1, 2001. At the mediation, plaintiff reduced her demand from $149,000 to $100,000 while defendants' highest offer was $75,000. The mediator recommended that the parties "split the difference" and settle the case for $87,500. Nevertheless, defendants offered $75,000 which plaintiff rejected. Plaintiff claims and defense counsel David S. Spini denies, that

he told plaintiff's counsel Ronald P. Goldman that "given time, Allied [the insurance carrier] would likely pay $87,500.00 to settle the case," or, "that in time, Allied might come around to pay the $87,500.00 closer to trial," nor did he intend to imply such. What Spini recalls telling Goldman is that "it was unlikely any more money would be offered until expert discovery had been completed, as up to that time no such discovery had been conducted."

Two weeks later on June 13, 2001, defendants submitted a written 998 offer of $60,000. Plaintiff countered with a $99,999 offer. Defendants rejected it. Neither party explained to the other why the latest 998 offers differed so markedly from the offers made at mediation.

On the afternoon of September 28, 2001, the court held a mandatory settlement conference after the denial that morning of plaintiff's motion for summary adjudication on the issue of liability. During the settlement conference, defendants renewed their $75,000 offer. Plaintiff's lowest demand was $80,000. Three days later, Goldman called Spini and tried to accept the offer, but, "[u]nfortunately," defendants state in their brief, "the outcome of [plaintiff's] motion for summary adjudication was not communicated to the insurance claims representative . . . until *after* the settlement conference had ended. Learning that [plaintiff] had not established negligence as a matter of law, [defendants'] insurance company, feeling liability could be defensed at trial, decided to reduce settlement authority to $60,000.00." (Original italics.) Defense counsel told Goldman that the offer remained at $60,000. Eight days after the telephone conversation, plaintiff served a second 998 offer of $79,999. Thereafter plaintiffs noticed a deposition of expert in injury biomechanics Raymond Merala for October 29, 2001.

The matter was tried on November 26, 2001 and damages substantially lower than the settlement offer were awarded to plaintiff. On March 29, 2002, plaintiff moved to strike or tax costs with respect to defendant's entire cost memorandum. Her motion was based on the contention that defendants' 998 offer was not reasonable or in good faith

because "nothing had taken place" between the $75,000 offer at mediation when she claims defendants indicated that they would probably move up to $87,500, and the written 998 offer for only $60,000 two weeks later. Plaintiff concluded that without an explanation of any evidentiary change or justification, defendants' offer was in bad faith. In the alternative, plaintiff moved to strike or tax defendants' claim for $15,536.31 in witness fees. Plaintiff claimed defense expert Raymond Merala's witness fee was unnecessary, unreasonable, and excessive under the circumstances of the litigation. Plaintiff claims the invoices of defense expert Merala indicated his actual charges were $535 for July 10, 2001, and $47 for September 25, 2001. Plaintiff disregards Merala's invoices for "depo prep" and travel expenses, $4,103, and trial preparation consisting of conferring with the client, reviewing the file and pertinent literature, and assembling, copying, and organizing all the categories of material requested by plaintiff.

Defendants submitted the declaration of Greer Malone, a senior litigation specialist with the insurance company, who was managing the litigation. She stated, "[i]n fact, something had taken place: we would now be incurring significant expert expenses." She also noted that Spini's associate, who had handled the settlement negotiations on June 13 in his absence, did not convey to her the result of the motion for summary adjudication until after the negotiations were over. She stated that when plaintiff's claim was not ruled to be established as a matter of law, she determined defendants' position was "defensed at trial," and she reduced defense counsel's settlement authority.

At the hearing on the competing motions, the trial court added that the offer "was on the table even at the day of trial and you both are privy to that. I wasn't there. [¶] There was another settlement attempt before Judge Anton, not fruitful. Therefore, the trial occurred and the jury reached their verdict at significantly less than the 998 offer. I don't know how we can say it's not a good faith offer. There is nothing I see to suggest that the offer wasn't in good faith, and in all fairness the jury could have come back with

an award less than what they did. The evidence was there and they chose not to accept the injuries. Therefore, the 998 offer, I do feel, was made in good faith, was on the table and that offer existed and once again, they [*sic*] were rejected. So I think in fact, in all fairness, the 998 offer was a good offer. Therefore, the motion to tax costs by the defense of plaintiff's costs post offer is granted. [¶] Now as far as the defense motion to tax costs based on the 998 offer of defense, the expert testimony and the documentation submitted in the court file, says reasonably in its entirety. Therefore, the motion to tax costs of the . . . defendant's [*sic*] experts is denied." This appeal ensued.

ISSUES ON APPEAL

Plaintiff claims the finding that the 998 offer on June 13, 2001, was in good faith was (1) an arbitrary determination and an abuse of discretion, (2) a capricious disposition and an abuse of discretion, and (3) was "whimsical thinking" and an abuse of discretion.

STANDARD OF REVIEW

"We review the trial court's award of expert witness fees as a section 998 discretionary item of costs using an abuse of discretion standard. [Citation.]" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262 (*Jones*).) It is appellant's burden to establish an abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) "Judicial discretion" is "the sound judgment of the court, to be exercised according to the rules of law." (*Lent v. Tillson* (1887) 72 Cal. 404, 422.) It " 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' " (*In re Cortez* (1971) 6 Cal.3d 78, 85.)

The version of section 998, subdivision (c), in effect at the time of defendant's 2001 compromise offer provided: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. . . ." "The purpose of section 998 is to encourage the settlement of litigation without trial. [Citation.] To effectuate the purpose of the statute, a section 998 offer

must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement, . . .' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees. [Citation.]" (*Jones*, *supra*, 63 Cal.App.4th at pp. 1262-1263.)

DISCUSSION

Plaintiff claims that because $75,000 was offered at the mediation on June 1, and defense counsel indicated that $87,500 was "probable" in the future, "plaintiff could not reasonably have been expected to accept a section 998 offer of 20 per cent [*sic*] or only $60,000," less than two weeks later. (Original underscoring.) Plaintiff contends the $60,000 offer on June 13, "was neither in 'good faith' nor was it 'realistically reasonable' under the circumstances, but merely a 'gamesplaying' maneuver made so that defendant would qualify for the costs of expert witnesses . . . ." For these reasons, plaintiff concludes, the trial court abused its discretion in allowing $18,339.33 in costs to defendants.

"Whether a section 998 offer is reasonable must be determined by looking at circumstances when the offer was made. [Citation.] However, the reasonableness of an offer depends upon the information used to evaluate it. In many cases, a plaintiff and a defendant will not have the same information when an offer is made. For this reason, the reasonableness of an offer may lie in the eye of its beholder.

"As a general rule, the reasonableness of a defendant's offer is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon

information that was known or reasonably should have been known *to the defendant*. It goes without saying that a defendant is not expected to predict the exact amount of his exposure. If an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable. [Citation.]

"If the offer is found reasonable by the first test, it must then satisfy a second test: whether defendant's information was known or reasonably should have been known to plaintiff. This second test is necessary because the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699, fn. omitted (*Elrod*).) "Unless defendant communicates its exclusive knowledge to plaintiff with its offer, the offer is not reasonable and does not qualify as a valid section 998 offer. Since defendant knew or reasonably should have known plaintiff lacked information necessary to evaluate the offer, defendant did not make the offer in good faith for purposes of section 998.

"However, we emphasize the reasonableness of defendant's offer does not depend on information actually known to plaintiff but rather on information that was *known or reasonably should have been known.* The latter standard is an objective one: would a reasonable person have discovered the information?" (*Elrod*, *supra*, 195 Cal.App.3d at p. 700.)

Plaintiff concedes that the $60,000 offer was not a token or nominal offer. However, she argues that the information that defendant was going to incur substantial expert witness expenses was exactly the type of information that should have been presented to plaintiff to explain why defendant's offer went down from $75,000 at mediation to $60,000 twelve days later. However, when mediation failed and the matter

remained set for trial, plaintiff should have known that defendant would require expert testimony to defend itself since liability was not conceded and causation was in issue.

Plaintiff also reargues the position she presented to the trial court. For example, plaintiff says defense counsel represented that $87,500 was "probably" forthcoming after the $75,000 offer; defense counsel says he said no such thing. Plaintiff says expert witness fees should be limited to one day of the expert's preparation and one day of the expert's participation in his deposition. However, the record contains billing information and the declaration of defense counsel that establishes defendants incurred and paid in full the over $15,000 the trial court ordered.

The trial court resolved the conflict in evidence adversely to plaintiff. It is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*People v. Mason* (1955) 130 Cal.App.2d 533, 535.) The trial court's determination was supported by substantial evidence. Defendants made a good faith offer to plaintiff which was not premised on its exclusive knowledge. There was no abuse of discretion.

Notwithstanding, plaintiff argues that defendants improperly lowered their offer with the expectation plaintiff would not accept for the sole purpose of later recovering expert witness fees. This issue was argued to the trial court and also resolved adversely to plaintiff. Substantial evidence supported the determination. Defense counsel's settlement authority was set by Greer Malone, the litigation specialist assigned to the claim by the insurance company. She had authorized $75,000 before mediation although she lowered the amount authorized to $60,000 after the $75,000 998 offer was rejected because she anticipated substantial trial costs. However, she returned to the $75,000 amount for the settlement conference because she did not get word that the motion for summary adjudication had been denied that morning. When Malone did learn of the denial, she believed defendants' position was "defensed at trial." She returned to $60,000 as a reasonable settlement amount since defendants' liability had not been established as

a matter of law. She continued to authorize that amount even up to the day of trial. The $60,000 offer was not a " 'token' " or " 'nominal' " offer in that it was not so low that defendants could have "no expectation that [the] offer w[ould] be accepted" (*Jones*, *supra*, 63 Cal.App.4th at pp. 1262-1263) or that it constituted a "no-risk offer made for the sole purpose of later recovering [costs]." (*Id*. at p. 1263.) The trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Wunderlich, J.